Appendix

In the United States Circuit Court of Appeals for the Ninth Circuit

Benjamin H. Fuller and John J. Bernich, Appellants, vs. United States of America, Appellee.	No. 9221 Mar. 27, 1940

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Before: Garrecht, Haney and Healy, Circuit Judges.

Healy, Circuit Judge.

Appellants were convicted of violations of the statute relating to the presentation of false claims, 18 USCA §80, and of conspiracy to commit an offense against the United States, 18 USCA §88.

The indictment charges in six of its counts that appellants and four others (who were acquitted) wilfully falsified material facts in a matter within the jurisdiction of an agency of the United States. The falsification occurred in connection with the sale of quantities of gold to the mint at San Francisco. Under regulations issued by the Secretary of the Treasury pursuant to the Gold Reserve Act of 1934, 31 USCA

§§440 et seq., the mints were authorized to purchase gold from persons who had mined or panned it, on the condition that the gold be accompanied by an affidavit on a form called TG-19.[1] It was charged that in the affidavits which accompanied the tenders false information was given the mint concerning the source of the gold and the time of its production. Also that appellants falsely stated that it had been mined by themselves. There were six counts relating to as many falsifications and six relating to the use made of the affidavits. Appellants were convicted on all counts except the first, and were sentenced to serve five years on each count, the sentences to run concurrently.

It is urged that the Gold Reserve Act provides an exclusive penalty for the violation of its terms, thus superseding the false claims statute. By §4 of the act provision is made for the forfeiture of gold held in violation of the law, and for a "penalty equal to twice the value of the gold." The section does not purport to provide punishment as for a criminal offense. In any event it is immaterial whether it does or not, for the section obviously deals with an offense entirely distinct from that punishable under the false claims statute.

The indictment is attacked on the ground that the regulations do not require a statement of the various facts alleged to have been falsified in the affidavits. Paragraph 38 of the regulations requires that "an affidavit in form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold

1. For a discussion of the various forms of affidavit required by the regulations, see Hills v. United States, 9 Cir., 97 F. (2d) 710, 711-712.

by mining or panning . . ." The regulation does not particularize the information to be included in the affidavit. But form TG-19 in fact requires a statement of all the matters which the indictment charged to be false.

It is claimed that the court erred in refusing to grant appellants' motion for a change of venue from the southern to the northern division of the northern district of California. 28 USCA §114. It is said that all the offenses, except that of conspiracy, were committed in the northern division, for the reason that all of the affidavits were executed there and were presented, with the gold, to a bank in Amador County for transmission to the mint. However, the offenses had their culmination in the southern division, hence were triable there. All of the affidavits were addressed to the Superintendent of the Mint at San Francisco and all were acted upon at San Francisco. Counts 1 to 6 properly alleged that the defendants falsified the facts at San Francisco; and counts 7 to 12 with equal propriety alleged that the affidavits were used and caused to be used by appellants at that place.

Appellants moved for a bill of particulars, but there was no error in the denial of the motion. The offenses charged are described with great particularity in the indictment. The precise facts alleged to have been falsified are set out in the indictment and the affidavits themselves are incorporated in the various counts.

The evidence was sufficient to warrant the conviction of both appellants. There was proof of circumstances from which the jury might properly infer

that the gold was not in fact produced at the mine stated and that appellants themselves did not mine it. Appellants did not take the stand and no evidence was introduced in their defense.

These are the principal matters complained of. Other errors were assigned but we find none requiring a reversal.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 27, 1940. Paul P. O'Brien, Clerk.

"SEC. 38. Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof.—(1) The mints shall not purchase any gold under clause (a) of section 35 unless the deposit of such gold is accompanied by a properly executed affidavit as follows:

An affidavit on form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the United States or any place subject to the jurisdiction thereof: *Provided, however,* That such persons delivering gold in the form of nuggets or dust having an aggregate weight of not more than 5 ounces, which they have recovered from mining or panning in the United States or any place subject to the jurisdiction thereof, may accompany such delivery with full and complete information on form TG-19 without the requirement of an oath.

An affidavit on form TG-20 shall be filed with each delivery of gold by persons who have recovered such gold from gold-bearing materials in the regular course of their business of operating a custom mill, smelter, or refinery.

An affidavit on form TG-21 together with a statement also under oath giving (a) the names of the persons from whom gold was purchased; (b) amount and description of each lot of gold purchased; (c) the location of the mine or placer deposit from which each lot was taken; and (d) the period within which such gold was taken from the mine or placer deposit, shall be filed with each such delivery of gold by persons who have purchased such gold directly from the persons who have mined or panned such gold.

In addition such persons shall show that the gold was acquired, held, melted and treated, and transported by them in accordance with a license issued pursuant to section 23 hereof, or that such acquisition, holding, melting and treating, and transportation is permitted under article II without necessity of holding a license."

(See "Provisional Regulations Issued under Gold Reserve Act of 1934" on June 1, 1937, p. 18.)

"SEC. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) *for such other purposes as in his judgment are not inconsistent with the purposes of this Act.* Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in the Philippine Islands or other places beyond the limits of the continental United States.

SEC. 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited

to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred."

(48 Stats. 337, 340, 344.)

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 220

BENJAMIN H. FULLER and JOHN J. BERNICH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI, HERETOFORE FILED, to the United States Circuit Court of Appeals for the Ninth Circuit.

Fearing that we have not sufficiently stressed certain points in the Petition for Writ of Certiorari heretofore filed, we, with the permission of this Honorable Court, file this Supplement to Petition for Writ of Certiorari.

A.

HOLDING OF CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT, THAT "GOLD RESERVE ACT OF 1934" "DOES NOT PURPORT TO PROVIDE PUNISHMENT AS FOR A CRIMINAL OFFENSE" (SEE OPINION IN APPENDIX TO PETITION, p. ii), IS SQUARELY OPPOSED TO THE DECISION OF THIS COURT RENDERED IN UNITED STATES v. REISINGER, 128 U. S. 398-402, 32 L. ED. 480.

Said the Circuit Court of Appeals for the Ninth Circuit, in its opinion:

> "It is urged that the Gold Reserve Act provides an exclusive penalty for the violation of its terms, thus superseding the false claims statute. By Sec. 4 of the act provision is made for the *forfeiture* of gold held in violation of the law, and for a '*penalty* equal to twice the value of the gold.' *The section does not purport to provide punishment as for a criminal offense.*" (Italics ours.) (See Opinion in Appendix to Petition for Writ of Certiorari, p. ii.)

The words *"forfeiture", "penalty",* were construed by the United States Supreme Court, in *United States v. Reisinger,* 128 U. S. 398-402, 32 L. Ed. 480, *481-482,* as applicable to and comprehending "criminal offenses".

Said this Court, through Mr. Justice Lamar:

> "The only ground upon which the correctness of this interpretation may be doubted is, that the words 'penalty', 'liability' and 'forfeiture' do not apply to crimes and the punishments therefor, such as we are now considering. *We cannot assent*

to this. These words have been used by the great masters of Crown Law and the elementary writers as synonymous with the word punishment, in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that 'branch of jurisprudence which teaches of the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty.' Alluding to the importance of this department of legal science, he says: 'The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered.' Referring to the unwise policy of inflicting capital punishment for certain comparatively slight offenses, he speaks of them as 'these outrageous penalties', and repeatedly refers to laws that inflict the 'penalty of death'. He refers to other Acts prescribing certain punishments for treason as 'Acts of pains and penalties'.

That the Legislature intended that this 13th section should apply to all offenses is shown by Sec. 5598, R. S. under the title of 'Repealed Provisions', which is as follows:

'All offenses committed and all *penalties* or *forfeitures* incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made.'

It was the obvious intention of Sec. 13, R. S., to extend this provision to the repeal of any statute not embraced in such revision.

The views we have expressed find support in the case of the United States v. Ulrici, 3 Dill. 532,

which was an indictment for conspiring to de
fraud the Government of internal revenue taxes
It became necessary there to determine the mean
ing of the words 'penalty', 'forfeiture', 'liability'
and 'prosecution', in Sec. 13 of the Revised Stat
utes. The court, speaking by Mr. Justice Miller
said:

'But, without attempting to go into a precise
technical definition of each of these words, it is my
opinion that they were used by Congress to in-
clude all forms of punishment for crime; and as
strong evidence of this view, I found, during the
progress of the argument, and called the attention
of the counsel to a section, which prescribed fine
and imprisonment for two years, wherein Con-
gress used the words: "Shall be liable to a pen-
alty of not less than one thousand dollars * * * and
to imprisonment not more than two years." More-
over, any man using common language might say,
and very properly, that Congress had subjected a
party to a liability, and, if asked what liability,
might reply, a liability to be imprisoned. This is
a very general use of language, *and surely it
would not be understood as denoting a civil pro-
ceeding.* I think, therefore, that this word "lia-
bility" is intended to cover every form of punish-
ment to which a man subjects himself, by violat-
ing the common laws of the country. Besides, as
my brother Treat reminds me, the word prosecu-
tion is used in this section, and that usually de-
notes a criminal proceeding.' " (Italics ours.)

Under all of the text books and authorities, forfei-
ture and penalties are punishment for criminal acts.

"In the municipal law of England and the United States the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws."

Vol. 22 *Am. & Eng. Ency. Law* (2d Ed.), p. 654, and cases there cited.

"A forfeiture, so far as the present inquiry is concerned, is a loss of one's rights and interests in his property. It is deemed proper to treat of forfeitures in this article, because they are all included within the generic meaning of the term *'penalty'*"

Vol. 13 *Am. & Eng. Ency. Law* (2d Ed.), p. 54, and cases cited.

"The power to provide for fines, *forfeitures*, and *penalties* resides primarily in the various legislatures, which may punish for violations of whatever laws they have power to enact.

The governing bodies of the various political subdivisions of the states have no such power in the absence of a clear and distinct legislative delegation thereof, and when the power is delegated it can be exercised only within the strict limits of the grant.

A *penalty* must be expressly created and imposed by statute, and cannot be raised by implication."

Vol. 13 *Am. & Eng. Ency. Law* (2d Ed.), p. 55, and authorities.

The "Gold Reserve Act of 1934" providing for forfeiture of improperly held gold, is *highly penal* and hence government must show *intent* to violate the act.

U. S. v. 98 $20 Gold Coins, D. C. Pa. 1937, 20 F. Supp. 354.

We respectfully submit that the decision of the Circuit Court of Appeals for the Ninth Circuit on that point in the case at bar cannot be sustained and is in direct conflict with the decision of the United States Supreme Court in the case of *United States v. Reisinger,* supra.

B.

DECISION OF CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN CASE AT BAR IS CONTRARY TO DECISION OF U. S. DISTRICT COURT FOR EASTERN DISTRICT OF TEXAS.

In the case of *United States v. J. W. Gilliland et al.,* the United States District Court for the Eastern District of Texas sustained a demurrer to an indictment charging substantive offenses under the False Claims Act similar to those involved in the case at bar.

This case is now on appeal before this Honorable Court (see No. 245, October Term, 1940), having been brought here by the prosecution under the statutory jurisdiction to review by direct appeal the judgment complained of under Title 18 USCA, Sec. 682, otherwise known as "Criminal Appeals Act", and by Title 28 USCA, Sec. 345.

We thus have a conflict between the lower Federal Courts on the same subject.

The opinion in the case of *United States v. J. W. Gilliland et al.,* does not appear to have been as yet reported in the Federal Reporter but it is so illuminating and well reasoned that we refer to the full text thereof published and filed in this Court in the case of *United States v. Gilliland et al.,* No. 245, October Term 1940, in "Statement to Jurisdiction", at pages 7 to 34, inclusive.

Both cases involved the making of affidavits and using and causing to be used affidavits allegedly in violation of the False Claims Act.

In sustaining a demurrer to the indictment the learned District Judge (Hon. Benjamin C. Dawkins, of the Federal bench in the State of Louisiana), holding that the offenses alleged in violation of the False Claims Act should have been prosecuted under the special act, to-wit: the Connally Hot Oil Act, of February 22, 1935, just as, in the case at bar, the prosecution should have been had under the special act, to-wit: "Gold Reserve Act of 1934", instead of the False Claims Act, said:

> "Of course, where there is ambiguity or uncertainty, such reports may be resorted to in construing a statute, particularly to save it from unconstitutionality, but they cannot serve to overturn well-established principles of interpretation. *Granting that the Interior Department desired and thought it could make the harsh penalties of this section of the Criminal Code applicable to its*

administration of the Connally Act, that purpose could not be accomplished except by the use of proper legislative methods. While it is true that everyone is presumed to know the law, still it must be in such form that a reasonable person reading it can understand what is denounced and the penalty to be expected. Can it be fairly said that anyone, examining the provisions of both the Connally Act and Section 80 (a), would understand that, in addition to the comparatively light penalties imposed by the former for its violation, if he made a false affidavit or report with respect to matters covered by its provisions, he could be imprisoned for ten years and fined $10,000; whereas, if he transported a million barrels of hot oil in interstate commerce, without making such affidavit or report, he could be imprisoned not more than six months or fined not more than $2,000? In other words, that a single step of this particular nature would subject him to punishment twenty times as great as the completed act which the law was intended to prevent? It would seem that before such an astounding conclusion is reached, the purpose of Congress to make it possible should be clearly established. Under the well-known doctrine of ejusdem generis, general or omnibus clauses, such as 'in any matters within the jurisdiction of any department or agency', would mean matters of a similar or kindred nature to those dealt with in the explicit provisions of the law, in this instance, such as claims against, rights to or controversies about funds or property involved in 'operations of the Government.' To hold with the prosecution in this case, would be to say that Congress intended to create a multitude

of crimes with respect to operations of the innumerable and ever-growing departments, bureaus, and agencies of the Government by the simple means of amending in general terms a statute which had always been understood to apply to matters in which the Government was financially interested." (Italics ours.)

C.

FALSE CLAIMS ACT CANNOT SUPPORT INDICTMENT OR CONVICTION FOR MAKING AND/OR USING AND CAUSING TO BE USED ALLEGEDLY FALSE AFFIDAVITS BECAUSE U. S. MINT WAS NOT DEFRAUDED OF A SINGLE CENT NOR GOVERNMENTAL FUNCTION INTERFERED WITH IN SLIGHTEST DEGREE.

The indictment in the case at bar, drawn under the False Claims Act, charged and the conviction was obtained on the ground that the U. S. Mint was defrauded. (See Indictment, Tr. 22.)

The Solicitor-General, in his "Brief for the United States in Opposition" to our Petition for Writ of Certiorari, states in a footnote on pages 10-11:

> "It is several times stated by the petition (Pet. 16; Br. 38) that the United States did not lose by the transactions with them. It is well settled that under that portion of the conspiracy statute dealing with conspiracies to defraud the United States, allegation and proof of a pecuniary loss to the Government is not required." (Citing

> *Hammerschmidt v. United States,* 265 U. S. 182, 187; *Haas v. Henkel,* 216 U. S. 462, 479.) * * * "but the District Court for the Eastern District of Texas has ruled to the contrary in United States v. Gilliland (unreported) now pending on appeal to this Court (No. 245, present Term), It is not believed, however, that the granting of a writ of certiorari is required in the instant case because of this conflict. So far as the record indicates, the point was not *urged or decided* in the court below and it appears that petitioners' reference to a lack of pecuniary loss by the Government was intended to be only a *passing comment.*" (Italics ours.)

We hasten to correct this erroneous impression on the part of the Solicitor-General, that we were indulging in a mere *"passing comment"*.

Not only did we *urge* vigorously and repeatedly, orally and in the briefs, the "lack of pecuniary loss by the Government" in the trial Court and in the Circuit Court of Appeals both at the original hearing and on petition for rehearing but that contention was *decided* against the petitioners both in the trial Court and in the Appellate Court although it is true that the Appellate Court makes no mention of this *important point* in the opinion rendered by it. (See Opinion printed in Appendix to Petition for Writ of Certiorari, i-iv; see Demurrer, Tr. 59-60, Assignment of Error No. IV, Tr. 147; see Motion Arrest Judgment, Tr. 116-117, Assignment of Error No. XII, Tr. 149-150; see Motions for Instructed Verdict, Tr. 515, Assignment of Error Nos. VIII, IX, X, Tr. 148-149.)

In fact, one of our chief reasons for this Petition for Writ of Certiorari is based on that ground and will be found strenuously *urged* as ground:

"IV. PROSECUTION EVEN UNDER FALSE CLAIMS ACT CANNOT BE SUSTAINED", on pages 14 to 17 of our Petition, referring especially to pages 16 and 17 thereof and to pages 38 and 41-42 of Brief in support of Petition for Writ of Certiorari.

Wherefore, because of the gravity and importance of the questions involved in the Petition for Writ of Certiorari and in this Supplement to the Petition your petitioners pray that the decision and judgment of said Circuit Court of Appeals for the Ninth Circuit in the case lately pending therein entitled Benjamin H. Fuller and John J. Bernich, Appellants v. United States of America, Appellee, No. 9221, may be reviewed as provided by law and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the decision and judgment of said Circuit Court of Appeals for the Ninth Circuit and of the United States District Court in and for the Southern Division of the Northern District of California in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners now present, as an exhibit to this petition, a certified copy of the entire transcript of record before the Circuit Court of Appeals for the Ninth Circuit, with the original exhibits therein, to

which Court they pray the writ of certiorari may be directed.

Dated, San Francisco, California,
September 6, 1940.

MARSHALL B. WOODWORTH,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioners in the above entitled cause and that in my judgment the foregoing Supplement to Petition for Writ of Certiorari is well founded in point of law as well as in fact and that said Supplement is not interposed for delay.

Dated, San Francisco, California,
September 6, 1940.

MARSHALL B. WOODWORTH,
Attorney for Petitioners.